

## EUROPEAN COMMISSION

### GREEN PAPER ON THE MODERNISATION OF EU PUBLIC PROCUREMENT POLICY

#### SUBMISSION BY PROCUREMENT RESEARCH GROUP OF THE SOCIETY OF CONSERVATIVE LAWYERS TO THE EUROPEAN COMMISSION

#### FOREWORD

This paper has been prepared by the Procurement Research Group of the Society of Conservative Lawyers. The Society was founded in 1947 and is an affiliate of the Conservative Party of the United Kingdom. A leading Conservative think tank, the Society provides expert legal advice to the Conservative Front Bench in both Houses of Parliament and works with Conservative Parliamentarians on legal issues.

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#### 1. INTRODUCTION

##### 1.1 Modernisation

1.1.1 The European Commission published its important communication on the Single Market Act ("Communication") on 13 April 2011<sup>1</sup> containing its twelve levers to boost growth and strengthen confidence. One such lever recommended a "Revised and modernised public procurement legislative framework". The Communication is hugely relevant in many aspects of the Green Paper.

1.1.2 The Green Paper entitled "Towards a more efficient European Procurement Market"<sup>2</sup> states that the consultations are being undertaken "*with a view to simplifying and updating the European Public Procurement Legislation so as to make the award of contracts more flexible and enable public contracts to be put to better use in support of other policies*". A range of objectives are set out in the document and it does seem to the Group that the tenor of the whole document implies more complex rules, further regulation and increasing interference by the European Court which makes decisions which create uncertainty for the procurement process and immeasurably add to its expense quite contrary to some of the aspirations in the Communication. Some of these cases are referred to below.

1.1.3 By way of example, the National Housing Federation, which represents the housing association movement in England, has estimated that the costs of EU tendering are equivalent to 9,000 additional homes per year. Their Chief Executive, David Orr, said "*procurement rules are highly bureaucratic, extremely expensive, reduce our capacity to build new homes and bring no obvious benefit*".<sup>3</sup> As recommended below housing associations should no longer be public bodies for procurement purposes.

1.1.4 This experience is replicated by at least one local authority known to one member of our Group which was involved in a comparatively simple tendering process regarding three separate and identical contractual arrangements which concerned over £1 million in professional costs alone due to the competitive dialogue process.

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<sup>1</sup> Communication from the European Commission numbered COM(2011) 206/4

<sup>2</sup> Green Paper on the modernisation of public procurement policy European Commission, Brussels, 27.1.2011 COM (2011) 15 final

<sup>3</sup> EU tendering costs 9,000 homes a year - Inside Housing 11 February 2011

## 1.2 Treaty Principles

The Green Paper comments that the purpose of the European Public Procurement Rules is designed to be of potential interest to operators throughout the Internal Market, ensuring equal access to and fair competition for public contracts<sup>4</sup>. The experience of Group members is that, with one or two exceptions, there has been little or no interest from non-English speaking entities wishing to tender for many contracts advertised by English local authorities and housing associations. This is confirmed in paragraph 2.12 of the Communication so far as Europe as a whole is concerned.

## 1.3 Policy Objectives

- 1.3.1 These policy objectives are articulated in the Communication which stresses a number of key issues of concern to Member States which impact directly upon the public procurement regime. In particular these were high expectations from civil society and the importance of fostering growth and employment as well as the social dimensions of the internal market and the protection of public services. One of the key solutions involved facilitating the creation of SMEs and, in the context of social well-being and social entrepreneurship, encouraging cooperatives and mutual societies. (Paragraph 2.8 of the Communication).
- 1.3.2 By its nature, the blanket procurement regime imposed by the European Commission militates against legitimate policy objectives within Member States and does not take into account the need to reduce overall costs of procurement at a time of financial stringency. This issue is particularly relevant in the light of the UK Government's deficit reduction plans and their Localism agenda which is aimed at encouraging "*The creation and expansion of mutuals, co-operatives, charities and social enterprises, and enabling these groups to have much greater involvement in the running of public services*"<sup>5</sup>. There will thus be a clash between the rigid EU procurement rules and the desire on the part of Government and the public sector generally to pursue its key policy initiatives.
- 1.3.3 The UK Government plans to introduce a Community Right to Challenge in the Localism Bill (Clauses 66 to 70) whereby a voluntary or community body, charitable entity or employee co-operative could make a request to a senior local authority to take transfer of any services from such authority. Whilst this is a highly desirable approach to community involvement within the UK Government's Big Society ethos, unfortunately there is a requirement for the relevant authority "*to carry out a procurement exercise*" in respect of the relevant service<sup>6</sup>. It seems to the Group that any procurement of this nature, if cumbersome, is likely to discourage any body contemplating exercising the Right and may, therefore, entirely defeat the whole object of the policy initiative and permit the large contractors such as Serco or Capita to increase their participation in the market at the expense of smaller entities. David Cameron regarded the opportunity for employee co-operatives taking over their service to be the most significant transfer of responsibility since the Right to Buy in the 1980s<sup>7</sup>.
- 1.3.4 The UK Government has also attempted to improve the procurement opportunities for small and medium-sized enterprises (SMEs) and Francis Maude, the Cabinet Office Minister, has articulated a wish for 25% of public sector

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<sup>4</sup> Green Paper paragraph 1

<sup>5</sup> The Coalition's Programme for Government May 2010 and Modernising Commissioning: Increasing the role of charities, social enterprises, mutuals and co-operatives in public service delivery: Cabinet Office 2010

<sup>6</sup> The Localism Bill Clause 68(2)

<sup>7</sup> The Guardian 15 February 2010

contracts being let to SMEs<sup>8</sup>. Whilst this is welcome, it does not deal with the overriding issue as to the overall cost of procurement and the innate prejudice by public sector bodies against smaller contractors. In addition aspects of the procurement regime are too prescriptive, lack flexibility and hinder innovation.

- 1.3.5 Another of the UK Government's cherished policies, the Community Right to Buy, is also threatened by a leading CJEU decision as outlined in paragraph 2.1 below. Accordingly, the EU procurement rules could seriously undermine two of the leading elements of the Big Society ethos espoused by the UK Government unless changes are made to such rules.
- 1.3.6 In the rest of this paper we comment upon a number of the specific questions in the Green Paper and, in two cases, the Group has enlarged upon issues of particular concern in the UK.

## 2. COMMENTS UPON GREEN PAPER

### 2.1 Definition of 'Public Works Contract'

- 2.1.1 In **Question 2** there is a suggestion that the definition of "Public Works Contract" should be reviewed. We consider that greater clarity on this definition is vital in the light of the uncertainty caused by the **Roanne** judgment,<sup>9</sup> in which the CJEU held that development agreements concluded in the context of urban regeneration projects in the public interest could in principle be 'Public Works Contracts' engaging the Public Contracts Directive. In the United Kingdom the effect of this judgment has been to delay or abort significant regeneration projects throughout the UK and thereby frustrate the public interest and community benefits that they are intended to deliver. The beneficiary of such projects is the general public at large, as opposed to any particular public authority, and therefore their exclusion from the scope of the Directive would not undermine the purpose or effectiveness of the public procurement regime.
- 2.1.2 In the very recent case of **Helmut Müller**,<sup>10</sup> the CJEU appeared to take a more liberal stance than some interpretations of the **Roanne** judgment and it now appears to be the position that:
- (1) The main purpose of a development agreement will determine whether or not it is a public works contract.
  - (2) As in the the **Gestion Hotelera** case,<sup>11</sup> where the agreement involves 'works' which are not the main object of the contract but are incidental to another object which is outside the scope of the Directive, the Directive would not apply.
  - (3) Before an agreement to be within the scope of the Directive, its purpose must be to achieve a development which is "sufficient to fulfil an economic or technical function" for the contracting authority's immediate benefit. Something more than achieving a beneficial development in the public interest by the mere exercise of planning regulatory powers is required. The contracting authority needs to derive an actual economic benefit from the scheme.
  - (4) To fall within the scope of the Directive, the contract needs to place the contractor under a direct or indirect obligation to carry out the works.
  - (5) The requirement that, in order to fall within the scope of the Directive, the work must correspond to "the requirements specified by the contracting

<sup>8</sup> Speech or Summit for Small Business 1 November 2010 and announcement on 14 February 2011

<sup>9</sup> Jean Auroux and Others v Commune de Roanne (Case C-220/05 18 January 2007)

<sup>10</sup> *Helmut Müller* (Case C-451/08) [2010] 3 C.M.L.R. 18

<sup>11</sup> *Gestion Hotelera Internacional v Comunidad Autonoma de Canarias* [1994] ECR I-1329

authority” is not met by the mere fact that a development must comply with the local authority’s planning policies and objectives which may, for example, include general land use policy or a Section 106 Agreement entered into following grant of planning permission. The authority must have taken measures to define the type of work or, at the very least, have had a decisive influence on its design outside the town planning process.

2.1.3 Given the considerable uncertainty that the **Roanne** case has caused, we consider that the above propositions drawn from the **Helmut Müller** case should be given an explicit legislative basis in order to provide maximum clarity for the future. In particular, this would make clear that urban regeneration projects would not engage the Directive unless the developer is under an obligation to carry out the works and the authority in question stands to make an immediate economic benefit. Only in such cases is there a sufficient public sector element for the objectives of the public procurement regime to require that the Directive’s requirements are triggered.

2.1.4 Insofar as **Question 1** of the Green Paper suggests that all land transactions by public sector bodies should be subject to the procurement regime, we strongly oppose this suggestion. The disposal of land does not on any reasonable view constitute “works” or a “service” triggering the public procurement regime. Sufficient protection against market distortion is already provided by the fact that the undervalue disposal of land by a public authority to an economic operator engages the provisions of EU state aid law.<sup>12</sup> There is no coherent rationale justifying the imposition of an additional layer of regulation through EU public procurement law.

2.1.5 One of the other unintended consequences of the **Roanne** case is to threaten the UK Government’s Community Right to Buy set out in Clauses 71 to 88 of the Localism Bill. Under this right a parish council or community interest group can obtain a right of first refusal over land or buildings being “assets of community value”. Under the arrangements set out in Clause 79 there is a moratorium period when the owner of the land or building, whether a local authority or otherwise, awaits a bid from the community group. Since this right is likely to involve unused or underused local authority property where the group concerned already has a particular use or development in mind, **Roanne** could require the full EU procurement process. This type of transaction should always be treated as a land transaction.

## 2.2 Distinction between Part A and Part B Services

**Questions 4 and 5** deal with this particular issue. The distinction should remain but more services should be moved from Part A to Part B services and there should be a much more flexible regime for the latter. In particular, there should be no absolute requirement to undertake any advertising or market testing of Part B services under Treaty principles or otherwise unless there is a significant prospect of cross border interest in a particular Part B service contract. This will need to take into account the decisions in the **Telaustria**<sup>13</sup> and **Coname**<sup>14</sup> cases but hand back decision-making on local issues to the locally elected politicians within their communities reflecting the Localism agenda and ensuring continuation of public services where SMEs, charities or cooperatives are involved in the interests of social wellbeing.

## 2.3 Thresholds

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<sup>12</sup> See eg. Case 52/76 *Benedetti* [1977] ECR 163 and *Derbyshire County Council/Toyota*, O.J. 1992 L6/36.

<sup>13</sup> *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG* (Case C0324/98 and [2000] ECR 101074S)

<sup>14</sup> *Consorzio Aziende Metano (Coname) v Comune di Cingia de’ Botti* (Case C-231/03)

Under **Question 6** there should be a substantial increase in the thresholds in the services area and that such threshold should not be based upon a cumulative figure but simply upon the average annual cost of any potential tendering exercise. The current threshold of €193,000 or £156,442 is very low and would cover all but the smallest contracts. It is suggested that the threshold should be no less than those in the Utilities Directive and index linked.

#### 2.4 **Body Governed by Public Law**

This area needs to be updated so that the effects of the **Parking Brixen** case<sup>15</sup> can allow a more light touch process where a local authority or other public body is dealing with a co-operative created by their employees (and perhaps any social enterprise) desiring to take over the services of such public body. In paragraph 4.4 of the Green Paper and Question 97 it is hinted that non-profit making organisations should have special treatment in the award of contracts involving social services possibly with the use of greater flexibility in application of the award criteria. We consider that this should be the approach to employee co-operatives in all public service contracts. This would accord with the plans of the UK Government. As 2012 is the United Nations International Year of Co-operatives 2012, we urge the European Commission to agree to amendments of this nature to the procurement regime. The resolution adopted by the UN General Assembly<sup>16</sup> urged governments “*to promote the growth of co-operatives as business and social enterprises ..... and [utilise] and [develop] ... the potential of co-operatives*”. This amendment would be a fitting recognition of the important role co-operatives play in public sector service delivery.

#### 2.5 **Modernised Procedures**

The procedures for public procurement do need to be modernised and made far more flexible so as to reduce the significant bureaucratic costs and encourage innovation. Despite attempts by the European Commission to encourage SMEs to bid for public sector contracts the present system is very discouraging for them. This issue is reflected in paragraph 2.8 of the Communication. However, the following questions do suggest some ways in which simplification could take place:

- 2.5.1 **Question 15** deals with procedures and whether they lead to the “best possible procurement outcomes”. Although public sector entities are permitted to ignore particularly low tenders, unfortunately in the UK there is a tendency for “quality” to be subordinated to cost. There is a perceived risk that contractors wishing to increase their market share or eliminate competitors will bid particularly low to win a contract. Alternatively in recessionary times bids below cost price may be submitted to maintain volumes and/or turnover. Whilst the public sector entity may be pleased with the tendering process, all too frequently this is liable to result in subsequent renegotiation of the contract, poor commitment on the part of the contractor and even its bankruptcy.

Thus quality does merit a higher rating in procurement practice.

In addition, innovative procurement ideas and those which involve a better approach to whole life procurement should likewise merit a higher rate in assessing quality.

- 2.5.2 **Question 18** deals with the accelerated procedure. One issue of particular concern to the public sector in 2010 related to the administration of two large building maintenance companies who had many public sector contracts in respect of both planned and responsive repairs to residential property. In both cases the

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<sup>15</sup> Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG (Case C-458/03)

<sup>16</sup> Press Release from United Nations of 21 December 2009 and resolution A/RES/64/136 adopted on 11 February 2010.

administrator sold the company's contracts to a new (and respectable) organisation but many of the public sector bodies involved interpreted the rules to require a re-tendering of the works in question which gave rise to many individuals having half completed kitchens and bathrooms pending new contractual arrangements. Accordingly, there does need to be some flexibility introduced within the procurement rules to permit the transfer of contracts following administration. This issue is also reflected in **Question 41** where it is suggested that there should be a right for a contracting authority to change the supplier or terminate the contract in certain circumstances. Arguably on the transfer of liabilities and contracts or takeover of a supplier or contractor, there should be an obligation upon the contracting authority to accept the new supplier provided qualitative thresholds are met.

2.5.3 **Question 19** deals with the issue of more negotiation in public procurement procedures. The Group takes the view that there should be some circumstances whereby existing contracts could be lengthened even if there were no provisions within the contractual terms and regardless of whether extension was referred to in the original tendering approach. This particular topic ties in with **Question 25** where the Group considers that previous experience and track record with one or more bidders should, indeed, be taken into account, particularly in assessing quality.

## 2.6 **Specific Instruments for Small Contracting Authorities**

For reasons outlined above, under **Question 28**, there should be a far simpler regime where the "contractor" was either a voluntary body, social enterprise, charity, co-operative owned by the staff of the public sector body concerned or SME contractor provided certain qualitative thresholds were met. All local authorities work under a duty of "best value" so that this would ensure a robust contractual negotiation and appropriate arrangements to ensure continuous improvement in the services involved. This is a particularly important issue taking into account the Parking Brixen judgment<sup>12</sup> where contracts (above or below the threshold) may be of no interest in other Member States and there would be no material impact upon cross-border procurement.

## 2.7 **Public – Public Co-operation**

This paragraph is associated with the employee co-operative point referred to above.

## 2.8 **Substantial Contract Modifications**

We consider that any contract needs to reflect, and take into account, changes in custom and practice thus permitting changes to contractual arrangements. These should be incorporated in contractual documents prepared and agreed by the parties rather than within procurement directives but that the latter should permit – rather than regulate – such modifications.

It is the experience of research group members that some contractors following selection seek to renegotiate the terms of the contract upon which their bid was based with a view to agreeing substantial modifications. A contracting authority should be permitted to seek information as to whether tendering contractors have in the past adopted this practice so that there is a risk that any negotiated contract would in the future be subject to radical re-negotiation with adverse cost consequences.

## 2.9 **Changes Concerning Contractors**

Question 4 is referred to above in paragraph 2.5.

## 2.10 **More accessible European Procurement Market**

2.10.1 We have indicated above that SMEs and start-up organisations are unlikely to enter the market unless there is a significantly more flexible approach and a substantial increase in the monetary threshold in addition to amendments to the

regulations / Treaty principles which do not require general market testing in such circumstances.

#### 2.10.2 **Housing Associations**

The Group consider that housing associations should be exempt from the public procurement rules as their circumstances have considerably changed from the date upon which they were judged to be public sector bodies for procurement purposes following the EC reasoned opinion in 2002 (the “Opinion”)<sup>17</sup>. We set out below our views on this issue setting out in some depth the background to the original decision and the circumstances giving rise to such decision.

#### 2.10.3 **About Housing Associations**

The term “housing association” is used to refer to a not-for-profit organisation set up to provide affordable homes for people in need. Because their legal status varies across the four parts of the United Kingdom, this note concentrates on housing associations in England.

Across England, housing associations provide about two million homes for five million people<sup>18</sup> and have become the major providers of new homes for rent. By providing affordable homes where they are needed, housing associations are key drivers of successful communities and social mobility.

Housing associations are independently owned organisations and tend to have charitable status. Some were set up by churches, others are co-operatives owned by tenants. Most, however, are owned by independent trustees in a similar way to other incorporated charities. Housing associations are also independently managed, by a management committee or a board of directors.

#### 2.10.4 **The Application of Public Procurement Law to Housing Associations**

Public procurement law controls how the state purchases goods and services. Much of the public procurement law is European in origin, and its ostensible purpose is to prevent discrimination between suppliers in different Member States. The day-to-day rules for making purchases can be found in Directive 2004/18/EC, which has been implemented in England by the Public Contracts Regulations 2006 (“**PCR 2006**”).

Public procurement law recognises that the “state” can take many forms: from central government departments, through local authorities, to fire and rescue services. Procurement law therefore applies to any “contracting authority”, which satisfies the following definition<sup>19</sup>:

*A corporation established... for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and –*

<i>(i) financed wholly or mainly by another contracting authority;</i>	(The “needs test”) (The “finance test”)
<i>(ii) subject to management supervision by another contracting authority; and</i>	(The “supervision test”)
<i>(iii) more than half of the board of directors or members of which... are appointed by another contracting authority.</i>	(The “appointment test”)

<sup>17</sup> Commission of the European Communities Reasoned Opinion to the United Kingdom dated 26 June 2002 Infringement 2000/2219 Number C(2002)2340.

<sup>18</sup> National Housing Federation, [www.housing.org.uk/about\\_us/faqs.aspx](http://www.housing.org.uk/about_us/faqs.aspx)

<sup>19</sup> Public Contracts Regulations 2006, regulation 3

For a body to be subject to public procurement law, therefore, it must satisfy the needs test plus any one of the other three tests.

On 1 February 2001, the CJEU ruled<sup>20</sup> that the French equivalent of housing associations – their *sociétés anonymes d'habitations à loyer modéré* (“HLMs”) – were contracting authorities because they satisfied the needs test and the supervision test. Following the judgement, the European Commission served the United Kingdom with its opinion stating that our housing associations also meet these two tests.<sup>21</sup>

The Office of the Deputy Prime Minister eventually conceded the point, with the result that English housing associations have been advised that they are likely to be treated as contracting authorities.

#### 2.10.5 **Why is Contracting Authority Status a Problem for Housing Associations?**

All purchases by contracting authorities carry risk. Public procurement law allows aggrieved suppliers to sue contracting authorities for wasted bid costs and loss of profit if they are able to establish that a procurement exercise was not conducted in accordance with the strict rules in PCR 2006.

The level of risk increased dramatically in December 2009 with the coming into force of new enhanced remedies, including the ability to have signed contracts ruled ineffective<sup>22</sup> and mandatory financial penalties, which courts must set at a level which will prove dissuasive.<sup>23</sup>

The risks inherent in public procurement translate into serious inflated costs for housing associations. In addition to the time costs of complying with the bureaucratic elements of procurement law, housing associations regularly find that they need to take specific procurement law advice from solicitors and other professionals.

The total cost for the sector of contracting authority status is estimated at £30 million per year. If this money was instead available to leverage additional funding, it could support the construction of an additional 9,000 homes per year.<sup>24</sup>

Because procurement law was only ever intended to apply to the state and emanations of the state, housing associations typically do not benefit from the advice and support offered by government sources such as the Office for Government Commerce, except to the extent that general material is posted on its website.<sup>25</sup>

There are two particular aspects of procurement law that affect housing associations particularly seriously. The first concerns the purchase of properties at the development stage. Housing associations commonly act as the affordable housing partner in a larger mixed-tenure scheme. Indeed, many planning agreements (particularly in London) require this arrangement. The **Roanne** case treats the housing association's purchase of these affordable units as a works procurement unless the housing association has had absolutely no input in the specification of the units. This requires the housing association to ensure that the development agreement is correctly procured. Because the development is in the

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<sup>20</sup> European Commission v France (supported by United Kingdom), Court of Justice case C-237/99, 1 February 2001

<sup>21</sup> EU tendering costs 9,000 homes a year - Inside Housing 11 February 2011

<sup>22</sup> Public Contracts Regulations 2006, regulation 47J

<sup>23</sup> Ibid., regulation 47N

<sup>24</sup> EU tendering costs 9,000 homes a year - Inside Housing 11 February 2011

<sup>25</sup> Office for Government Commerce, [www.ogc.gov.uk/about\\_ogc\\_where\\_are\\_you\\_from.asp](http://www.ogc.gov.uk/about_ogc_where_are_you_from.asp)

hands of the private developer, however, the housing association commonly has little choice as to how the procurement is managed.

Secondly, the sector has been shaken by the collapse of maintenance contractors Connaught Partnerships and Rok. Although administrators acted quickly to sell contracts to willing purchasers, housing associations were advised that making payments to these new suppliers left them at risk of challenge under public procurement law<sup>26</sup>. Housing associations depend on outsourcing services to support their obligations to thousands of their tenants. This is referred to in paragraph 2.5.2 above.

#### 2.10.6 **Should Housing Associations be Contracting Authorities?**

As a reminder, a body is a contracting authority if it meets the needs test and any one of the finance, supervision or appointment tests.

##### 2.10.6.1 The needs test

It appears that both the British and the French governments have previously conceded that housing associations meet needs in the general interest, and that those needs do not have an industrial or commercial character.

This note will not, therefore, concentrate on the needs test except to say that the notion that affordable housing cannot be carried out commercially is now rather out-of-date. Where planning law requires provision of affordable housing, land values adjust naturally. Consequently, it is quite possible to make a trading profit from affordable housing.

As charities, housing associations reinvest any surplus for their charitable objectives. However, the Housing and Regeneration Act 2008 explicitly anticipates and makes provision for for-profit providers of social housing. The needs test refers to the character of the needs, and not of the bodies meeting those needs. So where a for-profit organisation and a charity can both viably meet the needs of the same beneficiaries, there is a real argument that the need itself is a commercial one.

Furthermore, it is not correct to think of housing associations as carrying out duties that properly rest with the state. Under the Housing Act 1985, local authorities have the power to provide affordable housing, but have no explicit duty to do so. While some housing associations were formed to take possession of former council homes, many were not. Housing associations no more carry out government duties as do charities acting in the healthcare or education sectors

##### 2.10.6.2 The finance test

The finance test is satisfied if an organisation is “*financed wholly or mainly*” by another contracting authority, which means that more than half of the organisation’s financing must flow from public grants.<sup>27</sup>

Housing associations do receive grants, principally from the Homes and Communities Agency for new developments. These grant levels are falling to the extent that they now contribute a minority of funding for most new developments – the balance being made up by borrowing against future rental income.

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<sup>26</sup> Carl Brown, 2010. Landlords reject Lovell deal over EU legal issue. *Inside Housing* 17 September

<sup>27</sup> *R v HM Treasury ex parte University of Cambridge*, Court of Justice case C-380/98, 3 October 2010, paragraph 33

Housing associations are therefore unlikely to receive a majority of their financing from grants. If the finance test is the only issue, the Court of Justice has ruled that an organisation may judge annually whether it will meet the test by reference to its forecast income<sup>28</sup> - entirely eliminating the need for a sector-wide inclusion.

#### 2.10.6.3 The supervision test

The European Commission based its reasoned opinion to the United Kingdom on the supervision test. In that opinion, the EC highlighted several positions from the Housing Act 1996. This statute contained regulatory provisions for housing associations that were registered with the Housing Corporation to become Registered Social Landlords (“RSLs”).

In England, the RSL regime has now been abolished. Housing associations can now register to be regulated by the Tenants Services Authority (“TSA”) under the Housing and Regeneration Act 2008 (“HRA 2008”). Housing associations that do so are now known as “non-profit registered providers of social housing”. Registration with the TSA is entirely voluntary, but housing associations that were previously RSLs automatically become registered providers.

The CJEU explained that the supervision test will be satisfied where the supervision results in the organisation being as dependent on the supervising authority as it would be if one of the other tests was satisfied<sup>29</sup>. So the supervision test is only satisfied where a housing association is as dependent on its regulator as it would be on a body providing a majority of its funding. This dependence needs to be able to affect procurement decisions.

The new regime under the HRA 2008 is designed to be ‘light touch’ in nature, with strict rules giving way to broader standards. Indeed, one of the TSA’s fundamental statutory objectives is to regulate “*in a manner which minimises interference*”<sup>30</sup>.

Where the regulator does set standards, the TSA must specifically “*have regard to the desirability of registered providers being free to choose how to provide services and conduct business*”<sup>31</sup>. Standards must not be set without consultation with sector representatives. The implication of this is that standards must relate to broad, qualitative matters rather than the manner in which individual decisions are taken. This is very different to the previous regime and also different to the HLM regime in France which the EC relied upon in its reasoned opinion. Of that regime, the EC said that legislation “*did not specify the limits within which such supervision was to be exercised*”; this is patently no longer the case in England.

The UK Secretary of State has reserve power to set standards, but can only do so in relation to matters wholly unrelated to the procurement of contracts and only after having regard to the requirement to minimise interference.<sup>32</sup>

The TSA has a variety of enforcement powers, but these again cannot be exercised without considering the desirability of independent operation referred to above. In cases of severe default by a registered provider, the TSA is able to intervene in the management of registered providers. In such

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<sup>28</sup> Ibid, paragraph 44

<sup>29</sup> *European Commission v France*, op. cit., paragraph 49

<sup>30</sup> Housing and Regeneration Act 2008, s86(11)(a)

<sup>31</sup> Ibid., s193

<sup>32</sup> Ibid., s197

a circumstance, the housing association in question may well pass the supervision test. However, until the enforcement provision begins following a default, the TSA is not entitled to supervise the day-to-day decision making function of housing associations.

The TSA also enjoys miscellaneous powers relating to auditing and control of disposals. It should be noted that housing associations which are incorporated as industrial and provident societies and which have become registered providers are exempt charities . An exempt charity is a charity which is not required to register with the Charity Commission because it is already regulated to an equivalent extent. The TSA's powers therefore are largely in place of the regulatory regime controlled by the Charity Commission for registered charities, which are recognised as independent private organisations.

2.10.6.4 The appointments test

The TSA has limited powers to remove officers of registered providers and appoint persons to act in their place. However, these powers are exercisable only in the case of default – until such default has occurred the TSA simply does not have the appointment power and any purported exercise of it could be challenged by way of judicial review or the appeal procedure under the HRA 2008. It is submitted, therefore, that the appointment test is not satisfied in respect of housing associations until the TSA has served an enforcement notice on the registered provider.

2.10.7 **Suggested Reforms**

2.10.7.1 Issue updated guidance to housing associations allowing individual housing organisations to assess whether they are contracting authorities. The presumption should be that housing associations are not contracting authorities unless:

- (a) they forecast that over 50% of their financing in a particular financial year will derive from public grants; or
- (b) (if the housing association is a registered provider) the TSA takes active steps to supervise or intervene in day-to-day management following the service of an enforcement notice.

2.10.7.2 Issue guidance to housing associations relating to compliance with their procurement law obligations following the **Roanne** case. This guidance should be specific to the challenges faced by housing associations.

2.10.7.3 Seek legislative clarification as to the procurement status of novations following the insolvency of economic operators. Novations should not be seen as new contracts for procurement law purposes if let for the remaining duration of the original contract and on substantially the same commercial terms.

2.10.8 There is a suggestion in **Question 52** that SMEs should be given better access from the area where any contract is being undertaken. This has, hitherto, been frowned upon by the Commission. However, it should be actively encouraged as it does seem somewhat perverse that a regeneration project in a particular town or city is then undertaken by tradesmen working elsewhere in the UK or, indeed, in Europe. This proposal should be handled so that contracting authorities can require a successful tenderer to subcontract a given share of the contract value to third parties in the locality on the basis that the subcontractor has the relevant skills to undertake the work. This would have significant community benefits by securing and increasing employment.

### 2.11 **Strategic Use of Public Procurement in response to New Challenges**

We have earlier in this submission indicated that the current financial climate and the deficit reduction plans make it especially desirable that contracts be let to local firms within areas of deprivation. In addition, under **Question 70**, it would be desirable to eliminate the criterion of the lowest price only or ensure that it attracts a far lower weighting in the consideration process than hitherto. We have referred to this issue above in paragraph 2.5.

### 2.12 **Innovation**

2.12.1 In answer to **Question 92** there is insufficient protection of intellectual property rights and innovative solutions and the regulations should be amended to remedy this. Procurement is expensive, and it is additionally discouraging for potential contractors to know they run the risk of having their innovative ideas “stolen” by the public sector for subsequent re-use.

2.12.2 There is a perception that one or two public sector entities (particularly in the healthcare sector) tend to seek innovative solutions as part of the procurement process but then terminated the process subsequently leaving them free to recycle innovative arrangements suggested by potential contractors.

### 2.13 **Social Services**

2.13.1 Social Services should remain in Annexe B. It is suggested in **Question 97** that there should be the possibility of reserving contracts involving social services to non-profit organisations. We have referred to this possibility above and believe that there would be considerable merit in incorporating special privileges, not only in the social services area but in other aspects of public sector work – particularly for local authorities and where employee co-operatives are involved. (Paragraph 2.4)

2.13.2 This questions is arguably the most significant in the Green Paper. Throughout the UK, and elsewhere in Europe, the public services are under pressure. It is reflected in the Communication and manifests itself in the various austerity programmes occurring in the UK and elsewhere. Public sector entities including local authorities, and seeking alternative service delivery options which often involve transferring services to community based bodies, such as charities and not-for-profit entities, or SMEs. Thus this paragraph needs to apply to a range of public and personal services currently provided by a public sector entity rather than for “social services” alone.

## 3. **PRIORITY ISSUES (Question 104)**

The research group considers that the following should be treated as priority issues:

3.1 Exempting housing associations from the EU procurement regime. (Paragraph 2.10)

3.2 Instituting a regime of greater flexibility, to facilitate innovation and direct negotiation by public sector entities (particularly local authorities) with employee-controlled co-operatives, voluntary bodies, social enterprises and charities. (Paragraphs 1.3, 2.4, 2.6 and 2.13)

3.3 Considerable increase in the value threshold for services to be calculated on an annual basis and index linked. (Paragraph 2.3)

## **CONTACT**

Simon Randall CBE  
Convenor of Society of Conservative Lawyers Public Procurement Group

[srandall@wslaw.co.uk](mailto:srandall@wslaw.co.uk)  
T: 020 7593 5108  
F: 020 7593 0316  
c/o Winckworth Sherwood LLP  
Minerva House  
5 Montague Close  
London  
SE1 9BB  
[www.wslaw.co.uk](http://www.wslaw.co.uk)